United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1177

To be argued by
HAROLD JAMES PICKERSTEIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1177

UNITED STATES OF AMERICA,
Appellee,

—v.—

WILLIAM EUGENE ROBINSON,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE

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FILED
AUG 23 1976
RAOUL FIGARO, CLERK
SECOND CIRCUIT

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Statement of the Case

This is an appeal from a judgment of conviction in the United States District Court for the District of Connecticut entered by the Court (Zampano, *J.*), on April 12, 1976, after jury verdicts of guilty on February 3, 1976.

On March 10, 1975, a Grand Jury in New Haven, Connecticut, returned a three count indictment (Criminal No. N-75-20) charging appellant William Eugene Robinson and a co-defendant, David James Tate, with armed robbery of the Connecticut National Bank, Trap Falls Office, Shelton, Connecticut, on February 18, 1975, in violation of 18 U.S.C. 2113(a), (b) and (d). On June 9, 1975, Tate entered a plea of guilty to Count 2 of the indictment. A jury was empaneled on the same day, before Judge Newman and the trial proceeded as to Robin-

son. On June 13, 1975, the jury stated that it was unable to reach a verdict, and a mistrial was declared. Tate was given a ten year sentence on September 9, 1975 by Judge Zampano.

On January 20, 1976, a jury was empaneled before Judge Zampano for the retrial. Evidence began on January 27, 1976, and on February 3, 1976, the jury returned verdicts of guilty as to Counts 1 and 2 of the indictment, and not guilty as to Count 3. Robinson was sentenced on April 12, 1975, to 15 years. Judge Zampano set an appeal bond in the amount of $35,000 with surety.

Notice of Appeal to this Court was filed on April 12, 1976.

Statutes and Rules Involved

18 U.S.C. § 2113(a):

Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank credit union, or any savings and loan association; or

Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—

Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

18 U.S.C. § 2113(b):

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

28 U.S.C. § 144:

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith. As amended May 24, 1949, c. 139, § 65, 63 Stat. 99.

Rule 704, Federal Rules of Evidence:

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Rule 803(6), Federal Rules of Evidence:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . .

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Rule 803(7), Federal Rules of Evidence:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . .

> Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter

was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

Rule 701, Federal Rules of Evidence:

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

Questions Presented

I. Did the trial court err in failing to disqualify itself?

II. Did the trial court properly exclude the Wilson, Maher, and Fabrizi testimony?

III. Did the trial err in admitting the Glennon rebuttal evidence, excluding the Porter surrebuttal evidence, and denying the defendant's request for continuance?

IV. Did the trial court properly instruct the jury on eye-witness identification?

Statement of Facts

On February 18, 1975, at approximately 1:50 p.m., the Trap Falls Office of the Connecticut National Bank, in Shelton, Connecticut, was robbed by three armed men. Two of the robbers carried handguns, and a third, who was masked, carried a shotgun. The sum of $2,034 was taken by the men, who fled the bank.

Two tellers, Retta Mondulick and Robert Welch, were in the bank at the time of the robbery. Surveillance photographs were taken by an automatic camera in the bank which had been activated by the tellers as soon as the robbers entered. These photographs were processed, and widely circulated. Based upon an identification of the defendant Robinson by an informant, an arrest warrant was issued for Robinson's arrest on February 24, 1975. The next day, in an attempt to arrest the defendant, Special Agents of the Federal Bureau of Investigation went to his apartment; when their knocks on the door went unanswered, they broke in. Finding no one in the apartment, they left. The agents returned that evening and spoke to the defendant's wife, who invited them in to the apartment and consented to a search of the premises. A leather coat, belonging to the defendant, and which resembled the coat worn by one of the robbers, was taken.

Robinson surrendered to the Federal Bureau of Investigation on February 28, 1975.

A spread of photographs, including one of Robinson, was shown to the tellers, Welch and Mondulick. Both immediately identified Robinson as one of the robbers and subsequently made in-court identifications of the defendant as one of the robbers.

Robinson filed motions to suppress the identifications, which were heard on June 5, 1975. Outside the court-

room, Robinson inadvertently appeared in the hallway where Mondulick and Welch were standing. Both immediately identified him as one of the robbers. The motions to suppress the identifications were denied.

The first trial before Judge Newman resulted in a hung jury. At this trial, the co-defendant Tate did not testify.

On September 9, 1975, Tate appeared for sentencing before Judge Zampano. He received a 10 year sentence, the maximum under the Count of the indictment to which he had pleaded (18 U.S.C. 2113(b).)

On September 18, 1975, Tate was called before a federal grand jury in Hartford, Connecticut, where he was questioned about the bank robbery. He refused to testify, and, upon the application of the Government, an order of immunity pursuant to 18 U.S.C. 6003 was entered (Clarie, *C.J.*). Tate persisted in his refusal to testify, and was adjudged in contempt. Judge Clarie ordered Tate committed to custody for the term of the grand jury, and further indicated that this contempt sentence should interrupt Tate's substantive sentence.

On January 20, 1976, a jury was empaneled before Judge Zampano to hear the retrial. On January 26, 1976, before evidence began, Tate decided to cooperate with the Government and testify against Robinson. Evidence began on January 27, 1976.

At trial, Mondulick and Welch identified Robinson as one of the robbers, Tate testified that he had robbed the bank along with Robinson and one Luther Fleming. The Government established that the sum of $2,034.00 was taken from the bank, and that the bank was insured by the Federal Deposit Insurance Corporation.

The jury returned verdicts of guilty as to Counts 1 and 2 of the indictment, charging violations of 18 U.S.C. 2113(a) and (b). The jury acquitted Robinson with respect to Count 3 which charged a violation of 18 U.S.C. 2113(d).

ARGUMENT

I.

The court below did not err in failing to disqualify itself.

Robinson claims that the court below committed error in failing to disqualify itself because it had sentenced a co-defendant who had pled guilty to one count of the indictment and ultimately testified at trial for the Government. Additionally, Robinson points to the fact that the trial court had pending before it Tate's motion to reduce sentence, filed pursuant to F.R. Crim. P. 35. Therefore, Robinson claims that as a matter of law, the court could not conduct Robinson's trial in a fair and impartial manner.[1]

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[1] The indictment in this case, charging both Robinson and David James Tate with armed bank robbery in violation of 18 U.S.C. 2113(a),(b), and (d), was returned by the grand jury on March 10, 1975. Tate entered a plea of guilty to Count 2, charging a violation of 18 U.S.C. 2113(b), on June 9, 1975. Robinson's trial before Judge Newman proceeded forward on the same day; Tate did not testify at this trial. The jury was unable to reach a verdict, and a mistrial was declared. Tate was sentenced to a term of 10 years on September 9, 1975, by Judge Zampano; on September 18, 1975, Tate appeared before a grand jury and was questioned about his role in this bank robbery. He declined to testify; an order of immunity was entered by Chief Judge Clarie pursuant to 18 U.S.C. 6003. Tate persisted in his refusal to testify and he was adjudged in contempt,

[Footnote continued on following page]

The Government does not challenge the timeliness of the affidavit of personal prejudice which was filed in this case pursuant to 28 U.S.C. 144. However, it is clear that the court below did not err in refusing to disqualify itself. Disqualification of a judge is warranted only if the alleged bias and prejudice stems from an extrajudicial source and has resulted in the information of an opinion on the merits of the case not based upon what the Judge has learned in the proceeding pending before him. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583 (1966); *United States* v. *Sclafani*, 487 F.2d 245, 255 (2d Cir.), *cert. denied*, 414 U.S. 1023 (1973). As this Court stated in *United States* v. *Bernstein*, — F.2d —, Slip Op. 6631, 6644 (2d Cir. Nos. 74-2328-29, 74-2462-64, Mar. 4, 1976):

> The rule of law . . . is that what a judge learns in his judicial capacity—whether by way of guilty pleas of co-defendants or by way of pre-trial proceedings, or both—is a proper basis for judicial observations, and the use of such information is not the kind of matter that results in disqualification.

Judge Zampano imposed the maximum permissible sentence on the co-defendant, Tate. The reasons for the imposition of this sentence were clearly set forth by Judge Zampano at the time of sentencing. (App. 121). The sentence was not based on Tate's non-cooperation with the Government, but, *inter alia*, on his lengthy prior criminal record, his lack of remorse, and the strength of the case against him. Indeed, Judge Zampano expressly

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and was committed to custody for the term of the grand jury, approximately 13 months. Robinson's retrial began on January 27, 1976, before Judge Zampano; on January 27, Tate testified for the Government against Robinson and purged himself of contempt. The affidavit of personal prejudice was filed by Robinson on January 29, 1976.

stated that he was not taking Tate's lack of cooperation into account in imposing sentence. (App. 127). The Court made no suggestion that Tate could obtain a reduction in his sentence by deciding to cooperate with the Government in its case against Robinson; at the time of Tate's sentencing, he had not even been called before the Grand Jury. And while Tate did file a motion to reduce his sentence, his motion was filed well before he had even made a decision to cooperate.[2]

There is no indication that Judge Zampano held Tate's motion in abeyance to force him to testify; to the contrary, Judge Zampano expressly indicated that the only reason that the motion had not been decided at the time of trial was the press of court business.[3] (App. 32-34).

The test for determining a motion to disqualify a Judge from a trial pending before him was well summarized in *Lazofsky* v. *Somerset Bus Co.*, 389 F. Supp. 1041, 1043 (E.D.N.Y. 1975):

> To the extent that generalization is possible, the courts have construed Section 144 to require that the bias (or prejudice) be (1) bias in fact (rather

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[2] Tate's pro se motion under Rule 35 was filed on December 4, 1975. He did not decide to cooperate with the Government until January 26, 1976. In return for Tate's cooperation, the Government agreed (1) not to oppose his Rule 35 motion; (2) to place him in an institution, apart from Robinson; and (3) that his testimony would purge him of the contempt citation.

[3] The Rule 35 motion was filed well within the 120 day period prescribed by the rule. The fact that it was not decided until after the 120 day period had elapsed does not deprive the court of jurisdiction. *United States* v. *Polizzi*, 500 F.2d 856, 896 n. 73 (9th Cir., 1974), *cert. denied*, 419 U.S. 1120 (1975); *United States* v. *Ursini*, 296 F. Supp. 1152, 1153 (D. Conn. 1968). See 8A, J. Moore Federal Practice, Para. 35.02(2) (1976).

> than an attitude evidencing the appearance of bias), (2) directed at the party (rather than his attorney or the issues), (3) personal (rather than general, as against a class), and (4) extrajudicial in origin (that is, not developed in the course of litigation).

Applying this test to the case now before the court, it is clear that the affidavit is insufficient. The reasons for the imposition of the 10 year sentence on Tate were stated for the record, both at the time Tate was sentenced, and also to the trial jury. There was no evidence of the "carrot and stick" analysis pressed by Robinson; the contrary, in fact, is true. Tate himself testified that he did not believe that his lack of cooperation affected his sentence. There is no statement of fact in the affidavit of personal prejudice which demonstrates either personal bias or prejudice of a non-judicial character. And finally, defendant's claim that in the eyes of the jury the court was irreparably aligned with the prosecution is based purely on speculation and conjecture and finds no support in the record. Indeed, a specific instruction was given to the jury with respect to the pendency of this motion. (App. 58-59). There is no evidence of bias or prejudice by the court against Robinson that is extrajudicial in origin; everything that Judge Zampano learned about; the case arose either from the evidence adduced before him at the time of Robinson's trial, or from what he learned during the course of sentencing the co-defendant, Tate. Robinson can point to nothing more than this in his claim for the simple reason that there is nothing more to which he can point.

On the basis of the affidavit of personal prejudice, the court below was duty bound *not* to disqualify itself. *Rosen* v. *Sugarman*, 357 F.2d 794, 797 (2d Cir., 1966); *Hodgson* v. *Liquor Salesmen's Union*, 444 F.2d 1744,

1348 (2d Cir., 1971); *United States* v. *Sclafani, supra; United States* v. *Bernstein, supra.* The result urged by Robinson would, if adopted by this court, forever prevent a judge from sentencing a co-defendant and then proceeding to trial with other co-defendants, for clearly, a co-defendant who pleads guilty and agrees to cooperate and testify for the Government must always hope that the fact of his cooperation will, in some way, assist him. The law does not and should not require this result. The facts of this case do not materially differ from the facts in either *United States* v. *Sclafani, supra,* or in *United States* v. *Bernstein, supra;* the same result is required here as in those cases.[4]

II.

The trial court properly excluded the testimony of Kenneth Wilson, George Maher and Anthony Fabrizi.

Robinson attempted to introduce at trial the testimony of George Maher, Captain Anthony Fabrizi of the Bridgeport Police Department, and Kenneth Wilson. Maher, a guard at the Bridgeport Correctional Center, was asked as a lay witness to render his opinion of the identity of the robber depicted in a bank surveillance photo taken at the time of the robbery. (App. 129). The defendant subsequently proffered that Maher would testify that he thought the individual depicted in the photograph was Eli Turner. In this connection, counsel also offered the testimony of Captain Fabrizi[5] that Eli

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[4] It should be noted that Robinson does not claim that any of the grounds set forth in 28 U.S.C. 455 requiring disqualification of a judge are present in this case.

[5] The Government objected to the admission of the Fabrizi testimony, but agreed that if its objection were overruled that testimony could be offered by stipulation.

Turner was six feet, one inch tall, weighed one hundred and ninety pounds, and was thirty-five years old; that he was a suspect in two local armed robberies; and that he was being sought by police and had not been apprehended on the day the bank robbery occurred. (App. 138-39). The trial court sustained the Goverment's objections to the Maher and Fabrizi testimony. Kenneth Wilson, a lay witness and a friend of Robinson, was also asked his opinion of whether defendant was the person depicted in a bank surveillance photograph. (App. 146-47). The trial court sustained the Government's objections to that testimony as well. Robinson contends that the Wilson and Maher-Fabrizi testimony was admissible under Rules 701 and 704 of the Federal Rules of Evidence and that its exclusion was reversible error.

The trial court properly excluded the opinion evidence of the two lay witnesses and the interrela' l Fabrizi testimony. As the court noted in sustaining tne Government's objection, "it is the province of the jury to determine the similarities, if any, of the person in the photograph and this defendant" (App. 132). Since neither Maher nor Wilson were experts on any particular characteristic portrayed in the photographs, their opinion testimony was not probative; it "is something all laymen can do, look at a photograph and decide whether they know a person or not". (App. 132). There is authority for the proposition that an *expert* witness may properly testify about photographic comparisons involving particularly significant characteristics because this may be of assistance to the jury, e.g., *United States* v. *Cairns*, 434 F.2d 643 (9th Cir., 1970); *United States* v. *Brown*, 501 F.2d 146 (9th Cir., 1974), *rev'd on other grounds sub nom. United States* v. *Nobles*, 422 U.S. 225 (1975); *United States* v. *Fernandez*, (II), 480 F.2d 726 (2d Cir., 1973); *United States* v. *Brown*, 511 F.2d 920, 924 (2d Cir., 1975); *United States* v. *Harris*, — F.2d

— (17 Cr. L. Rep. 2197) (4th Cir., 1975); *United States* v. *Green*, 525 F.2d 386 (8th Cir., 1975); however, opinion testimony on identification based on only general features, even when offered by an expert, is inadmissible. *United States* v. *Brown*, *supra*, 501 F.2d at 150. Here the testimony offered by the defendant was the conclusiory opinion of laymen on the question of identity without reference to any outstanding physical characteristics.[6] Moreover, it appears that neither witness was shown the actual photograph upon which his opinion was based.

Robinson's reliance on Rules 701 and 704 of the Federal Rules of Evidence is misplaced. While it is true that the "ultimate issue" rule was specifically abolished with the adoption of the Federal Rules of Evidence, (Advisory Committee Note to Rule 704), opinion testimony by a lay witness is admissible only when "helpful to a clear understanding of his testimony or to the determination of a fact in issue". Rule 701, Federal Rules of Evidence. Opinion testimony on identity by lay witnesses if admitted in the instant case would be "meaningless assertions which amount to little more than choosing up sides" (Advisory Committee Notes to Rule 701) and was properly excluded. The trial court accurately noted the counterproductive consequences of admission of this non-probative testimony:

> Couldn't the Government put on a bunch of witnesses and say "In my opinion that is or is not the defendant," and then you would come back with a series of witnesses saying the opposite,

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[6] The court did allow Wilson to testify that he did not know Robinson to wear a hat similar to that worn by the robber in the photograph, which was, arguably, testimony about a particular characteristic of the defendant.

> and then the Government comes back with a series of witnesses to contradict or to re-enforce the testimony. (App. 133).

The Fabrizi testimony was also properly excluded as irrelevant. It was inextricably linked to the Maher testimony and certainly irrelevant once that testimony had been properly excluded. But even assuming Maher's testimony about Eli Turner was admissible, the degree of suspicion with which police regarded Turner would still be irrelevant on the issue of identification. Lastly, of course, if Robinson wished to demonstrate to the jury the likelihood that he had been mistakenly identified as Turner, a subpoena would have compelled Turner's appearance at the trial.

III.

The court did not err in (a) admitting the rebuttal testimony and evidence of Walter F. Glennon, (b) excluding the surrebuttal testimony of Robert E. Porter: and (c) denying the defendant's request for a continuance.

Robinson contests the admissibility of the Government's rebuttal evidence of records of the Labor Department of the State of Connecticut concerning the payment of unemployment compensation benefits to defense witness Joseph Burroughs which was offered through the testimony of Walter F. Glennon, the Manager of the New Haven Unemployment Compensation Office. Burrough's testimony provided an alibi for Robinson's whereabouts at the approximate time of the robbery on February 18, 1975. Burrough's memory of the events of February 18 was pegged to his receipt of an unemployment compensation check at the Bridgeport Unemployment Office on that date. The records of the State Labor

Department for the Bridgeport Unemployment Compensation Office contradicted Burroughs' testimony for they indicated Burroughs had received only one unemployment check during the month of February, and that was on February 5, not February 18.

Robinson's contention that Glennon was not a "qualified witness" within the meaning of Rule 803(6) of the Federal Rules of Evidence finds no support in the record. Glennon testified that he had worked for the State Labor Department for fifteen years in its central and local offices dealing with unemployment compensation benefits, that he had been manager of the New Haven office for three years, that for at least five years he had had occasion to read and interpret documents similar to those in question, and that he had in the past testified in court with respect to records of the State Labor Department. (App. 192-93). Additionally, he was sufficiently familiar with the records to testify that he had no doubt as to the correctness of the documents about which he was asked to testify. (App. 193).

Robinson here contends that the documents admitted into evidence through Mr. Glennon were shown to lack trustworthiness and should have been excluded. This too finds no support in the record. Indeed, the defendant appears to have conceded at trial the accuracy of the documents (Exhibits 17 and H) but contended that other records would have provided additional pertinent evidence. (App. 179-180). That argument, of course, goes to the weight of the evidence, not its admissibility. The trial court properly concluded that the records were sufficiently trustworthy and allowed their admission, but afforded Robinson ample opportunity to explore the reliability of these documents before the jury. Moreover, since defendant was no notice fully two weeks prior to trial (App. 153) that the Government would rely on these records to rebut the Burroughs' testimony, he

could have examined all pertinent records during that period and, if appropriate, subpoenaed them to trial.

Robinson further contends that the trial court erred in refusing to allow Robert E. Porter, an investigator, to testify in surrebuttal about a statement of an employee of the State Labor Department concerning alleged inaccuracies in records maintained by the Department. Alternatively, he argues that the court should have granted a continuance to allow him to present the testimony of that employee. Clearly, the proffered testimony of Porter was hearsay and inadmissible. More importantly, the proffered testimony was not proper surrebuttal for it was too general and imprecise and did not apply specifically to the records in question. Moreover, since the defendant was aware of the Government's intended rebuttal evidence prior to trial, he again had ample opportunity to subpoena any intended surrebuttal witnesses sufficiently in advance to avoid the necessity of delaying the trial.

IV.

The trial court's instruction on eye-witness identification was not erroneous.

The trial court properly instructed the jury on eye-witness identification (App. 54-57) and did not abuse its discretion in refusing defendant's additional Requests to Charge on this issue. The court appropriately noted that eye-witness identification was "one of the most important issues" in the case, and again emphasized the burden on the Government to prove identity beyond a reasonable doubt. (App. 54-57). Its instructions followed almost verbatim the model adopted by the District of Columbia Circuit, *United States* v. *Telfaire*, 469 F.2d 552 (D.C. Cir., 1972); See, Devitt and Blackmar,

Federal Jury Practice and Instructions, Section 1132A (1970) and cases cited therein, which incorporates the considerations relevant to weighing eye-witness testimony noted by the Supreme Court in *United States* v. *Wade*, 388 U.S. 218 (1967) and *Simmons* v. *United States*, 390 U.S. 377 (1968); *accord*, *United States* v. *Fernandez*, 456 F.2d 638 (2d Cir., 1972); *United States* v. *Evans*, 484 F.2d 1178 (2d Cir., 1973); *United States Ex Rel. Winfield* v. *Cascales*, 403 F. Supp. 956 (E.D. N.Y., 1975).[7]

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[7] The trial court instructed the jury on the identification issue as follows:

Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the offender at the time of the offenses and to make reliable identification later.

In appraising the identification testimony of a witness you should consider the following:

First, are you convinced that the witness had the capacity and an adequate opportunity to observe the defendant? Whether the witness had an adequate opportunity to observe the defendant at the time of the offense will be affected by such matters as how long or how short a time was available to observe, how close or how far the witness was and how good were the lighting conditions.

Second, are you satisfied that the identification made by the witness subsequent to the offenses is the product of his own recollection? Thus, you should take into account both the strength of the identification and the circumstances under which the identification was made. If the identification by the witnesses may have been influenced by circumstances under which the defendant was presented for identification, you should scrutinize the identification with great care.

You may also consider the length of time that elapsed between the occurrence of the crimes and the next opportunity of the witness to see the defendant as a factor bearing upon the reliability of the identification. In this regard, you may consider whether or not the circumstances and procedures surrounding the photographic identifications were so impermissibly

[Footnote continued on following page]

The trial court's instructions are clearly sufficient under the controlling decisions in this Circuit. *United States* v. *Evans*, *supra*; *United States* v. *Fernandez* (I), *supra*. While this court indicated in *Fernandez* that it might be appropriate in some cases to grant requests to charge on identification issues drawn on the language of *Wade* and *Simmons*, it noted that whether failure to grant such a request would constitute reversible error depended on the circumstances of each case. However, in *Evans*, as in the case at bar, where the defendant was afforded "the full opportunity . . . to develop all the facts relevant to identification and the (Court) gave careful and accurate instructions to the jury", 484 F.2d at 1188, it was not error for the trial court to refuse to give the additional instructions concerning eye-witness identification. Although the additional instructions requested here were given at the original trial which resulted in a hung jury, the prosecution's evidence there rested almost entirely on the eye-witness identifications by two victim tellers. Here, in addition to the tellers' testimony, the prosecution presented the testimony of an accomplice, David James Tate. Viewed from the perspective of the evidence presented and the opportunity for cross-examination, it is clear that the trial court properly instructed the jury on the issue of identification and did not abuse its discretion in refusing defendant's additional requests to charge.

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suggested that the in-court identifications are unreliable. It is for you to decide whether or not the eye-witness' in-court identification rested on original, untainted observation.

Four, finally, you must consider the credibility of each identification witness in the same way as any other witness. App. 55-57.

★ U. S. Government Printing Office 1976— 614—352—305